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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN, and LINDA BROSNAHAN,

Petitioners,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is like an intersection case in which the defendant repeatedly admits to running a red light, then secures summary judgment on the issue of negligence based on an (appellate) finding that the light was green. In granting summary judgment below, the Third Circuit reached conclusions of fact and law that are shockingly inconsistent with the undisputed record — even to the point of effectively holding that the coming of October 2000 preceded in time the coming of December 1999, and that the plain meaning of "is" is "was." The overarching question, then, is whether a court of appeals engages in meaningful appellate review when (to all appearances) it fails to even acquaint itself with the undisputed record facts. More specifically:

1. Does the summary judgment standard allow a court of appeals to disregard wholesale the undisputed material facts, where those facts are favorable to the nonmoving party?

2. Does an objective review of the opinion and record below compel the conclusion that the Third Circuit purported to resolve this appeal without either reading the petitioners' briefs or acquainting itself with the undisputed record facts?

3. Does this Court's supervisory function require it to remand the case for actual (and meaningful) appellate review?

4. Did the Third Circuit err in ignoring (and, by implication, rejecting) the Ninth Circuit's holding in *Travelers Indem. Co. of Ill. v. Ins. Co. of North America*, to the effect that where a liability insurer makes payment of indemnity on a claim, equity precludes its contesting the duty to defend that claim?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Brosnahan Builders, Inc. has no corporate parent, and there is no publicly held company owning ten percent or more of its stock.

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Petitioners Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan (collectively, the "Brosnahans") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The district court's March 30, 2001 memorandum opinion is published at 137 F. Supp. 2d 517, and reproduced in the accompanying appendix ("App.") at pages 6a-28a. The district court's January 18, 2002 order denying petitioners' motion to alter or amend the judgment is reproduced at pages 29a-30a of the appendix, but not otherwise published. The Third Circuit's January 21, 2003 opinion, and its March 6, 2003 order denying rehearing, appear at pages 1a-5a and 31a-32a of the appendix; neither is otherwise published.

STATEMENT OF JURISDICTION

The opinion and judgment for which review is sought were issued by the Third Circuit on January 21, 2003. By its order dated March 6, 2003, the Third Circuit denied rehearing. This petition is thus timely, having been filed within ninety days of the order denying rehearing. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an action for declaratory judgment, breach of contract and other relief. It arises under a policy of general liability insurance issued to the Brosnahans by respondent Harleysville Mutual Insurance Company ("Harleysville").

For the purposes of this petition, the principal relief sought is a declaration that Harleysville is liable for the costs of defending the Brosnahans in an underlying lawsuit titled *Pinkert v. John J. Olivieri, P.A.*, C.A. No. 99-380SLR (D. Del.).

The court of appeals' opinion merits review because it is not the product of a rational and orderly judicial process; because it has deprived the Brosnahans of both substantive and procedural due process; and because it does violence to the summary judgment standard. The issues are not ones of pedestrian legal error, because the court of appeals' analysis is simply not explicable in those terms. Rather, its analysis turned on discrete questions of fact — like whether a particular event happened in December 1999 or October 2000, or whether a certain written agreement was procured by fraud — that were undisputed between the parties. Yet in each instance, the court of appeals reached conclusions contrary to the undisputed record; and did so without explanation, or even the slightest intellectual nod to the true facts.

Consider the first of the examples cited above. The court of appeals was presented with the question of whether Harleysville had received notice of a particular fact in December 1999 (as the Brosnahans contended) or in October 2000 (as Harleysville's lawyers contended). The document that constituted the notice was featured prominently in the Brosnahans' briefs below, and clearly bore a December 1999 date. The Brosnahans further presented the sworn deposition testimony of two Harleysville designees, testifying under Federal Rule of Civil procedure 30(b)(6), through which Harleysville repeatedly admitted that it received the notice in December 1999. (As if to erase any doubt, one designee

stated flatly that Harleysville's earlier statements to the contrary were untrue.) Harleysville's answering brief made no mention of this evidence, even in rebuttal; and the Third Circuit concluded, without explanation, that the notice was received in October 2000. (As shown below, that conclusion was fatal to the Brosnahans' appeal.)

Is this ordinary error? Standing alone it might be, though of an egregious sort. But it does not stand alone. The Third Circuit's opinion is a patchwork of objective misstatements, wrong conclusions and departures from the undisputed record. It is explicable only as the product of a grossly subverted process: one in which the Third Circuit read the district court's memorandum opinion, consulted Harleysville's answering brief, and then rendered decision — without reading the Brosnahans' opening or reply briefs, or hearing the Brosnahans at oral argument.[1]

In short, review by this Court would constitute the first and only meaningful appellate review in the case.

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1. The Third Circuit's failure to consult, in any meaningful way, the Brosnahans' briefs and appendix below is reflected in one other feature of its opinion. That is, the Third Circuit makes a single passing reference to an argument raised by the Brosnahans before the district court, and memorialized by that court in denying the Brosnahans' motion to alter or amend the judgment. *Compare* App. 3a *with* App. 30a (noting, in both cases, waiver argument). But nowhere does the Third Circuit refer to any other fact, legal position or authority argued by the Brosnahans in their Third Circuit briefs. Had the Third Circuit been offering an advisory opinion, and had it solicited Harleysville's input without allowing the Brosnahans to even appear, the opinion would read no differently than it does today.

A. Proceedings in the District Court

The underlying *Pinkert* case was commenced in the district court in June 1999. It sought recovery of damages and other relief as against Brosnahan Builders, the Brosnahans and others in connection with the construction of a residential home in Bethany Beach, Delaware. Attempts by the Brosnahans to persuade Harleysville to defend them in the *Pinkert* case were unsuccessful; and this coverage litigation ensued.

The Brosnahans filed their complaint against Harleysville in the district court on May 24, 2000. Jurisdiction in that court rested on the diversity statute, 28 U.S.C. § 1332. The Brosnahans' complaint was directed solely to the duty to defend; and indeed, the Brosnahans have never sued Harleysville on the duty to indemnify.

On August 24, 2000, the Brosnahans moved for summary judgment on the duty to defend. Harleysville opposed the motion, and simultaneously filed its own cross-motion on the duty to defend. Harleysville also purported to move on the duty to indemnify, though that issue had never been joined in the pleadings. It further cross-moved on its argument (in the alternative) that any defense costs should be "apportioned" between Harleysville and the Brosnahans. Because the Brosnahans viewed the "apportionment" argument as an affirmative defense, and because it had never been pled by Harleysville, the Brosnahans moved to strike the argument on October 12, 2000. Thereafter, on February 5, 2001, the Brosnahans filed a conditional motion for summary judgment on their claim of bad faith breach of contract (conditional, that is, on the success of their "duty to defend" motion).

On March 30, 2001, the district court issued its memorandum opinion and order, denying the Brosnahans' motion for summary judgment on the duty to defend; granting Harleysville's cross-motion on the same issue; and denying as moot the Brosnahans' motion to strike and conditional motion for summary judgment on the bad faith issue. In its memorandum opinion, the district court held as follows:

• ***The "human agency" issue.*** The district court held that the *Pinkert* complaint did not allege the happening of an accident, so that the policy's requirement of an "occurrence" was not met. Its reasoning was simple, if startling: "The situation that led to the damage to the Pinkerts' home was clearly within the control of plaintiffs, as general contractor of the construction project, and not a fortuitous circumstance happening 'without human agency.'" App. 23a. In other words, the district court concluded that liability insurance must be reserved for events happening without human agency.

The logical consequence of this analysis — which is now the law of the Third Circuit — is that no actor's active negligence is insurable against third party liability. Drivers whose negligence behind the wheel causes injury to others act with human agency; so do surgeons guilty of medical negligence. But they should no longer turn to their liability insurers unless, say, an earthquake intervenes.

Lost in the district court's "human agency" analysis, meanwhile, was the fact that the *Pinkert* complaint alleged negligence against each of the Brosnahan insureds. Lost, too, was the (previously) universal standard for determining the presence or absence of an "accident" under general liability policies: whether the damage was expected or intended from

the standpoint of the insured. *See Nationwide Mut. Fire Ins. Co. of Columbus v. Pipher*, 140 F.3d 222, 228 (3d Cir. 1998) (Alito, J. concurring) (accidental damage under a general liability policy is that which is unintentionally caused). *See also* BARRY R. OSTRAGER AND THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 8.02[b] (11th ed. 2002) (collecting ten reported decisions for the proposition that "[t]he term 'accident' means unexpected and unintended.")

This last error was all the more critical because elsewhere in its opinion, the district court acknowledged that the *Pinkert* complaint ***did not*** allege expected or intended damage. That is, the district court held that the policy's Exclusion (a), which bars coverage for property damage "expected or intended from the standpoint of the insured," did not apply: "[T]he court concludes that since the *Pinkert* complaint alleges liability without intent, Exclusion 'a' does not apply." App. 25a. If the district court had simply applied this finding to the applicable legal standard, the Brosnahans would necessarily have prevailed on the "accident" issue.

• ***The "professional services" exclusion***. The district court found that the policy's Exclusion (j) (the "professional services" exclusion) bars coverage, because (a) the Brosnahans used subcontractors in effecting the underlying construction, and (b) by failing to adequately supervise those subcontractors, the Brosnahans rendered defective "professional services" within the exclusion's meaning.[2]

---

2. The *Pinkert* complaint makes no mention of the Brosnahans' use of subcontractors. In looking to the extrinsic fact of the subcontractors' involvement for purposes of Exclusion (j), it appears that the district court drew on its substantive knowledge of the actual facts of the *Pinkert* case (as opposed to the facts pled in the *Pinkert* complaint).

This holding was nearly as startling as the district court's "human agency" analysis. The policy, after all, is a dedicated insurance product for building contractors. Indeed, it bears the title "Contractor's Business Owners Policy." Hardly a construction project goes forward in America without the help of subcontractors; and if the use (and necessary supervision) of subcontractors places coverage out of reach, then the policy is rendered an illusory contract. Small wonder that at its Rule 30(b)(6) deposition, Harleysville admitted that Exclusion (j) does not apply.

• ***The meaning of "is."*** The district court held that Exclusion (k)(5) (which applies only where the Contractor "***is performing*** operations") also bars coverage, because the Brosnahans "***were performing*** 'operations' . . . ." App. 26a (emphasis added). It thus effectively held that the plain meaning of "is" is "was."

Significantly, the Brosnahans had served Harleysville with contention interrogatories, asking it to identify all policy exclusions on which it relied for its denial of coverage. In response, Harleysville identified just three exclusions (or one fewer than the district court ultimately upheld). Exclusion (k)(5) was not among them.

• ***The "your work" exclusion***. The district court also upheld Exclusion (m), the "your work" exclusion. It did so despite the exclusion's express exception for claims targeting the work of subcontractors, and despite the fact that (as Harleysville has repeatedly conceded) the *Pinkert* complaint does target the subcontractors' work. It reasoned that (a) though the *Pinkert* complaint indeed attacks the subcontractors' work, it does not mention the subcontractors by name, and (b) neither Harleysville nor the court could

properly consult facts extrinsic to the *Pinkert* complaint (like the identity of subcontractors) for purposes of the duty to defend.[3] In so holding, the district court ignored (as the Third Circuit would later ignore) more than fifty reported decisions for the proposition that where "an insurer obtains information [here, regarding the involvement of subcontractors] from which it appears that there might be coverage . . . the company has a duty to defend, even if the allegations of the complaint themselves would not give rise to such a duty." ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 4.03 (3d ed. 1995). *And see id.* (collecting cases to the same effect).[4]

• ***The "impaired property" exclusion***. The district court last found that Exclusion (n) (the "impaired property" exclusion) applies. It based this holding on its conclusion that the Brosnahans' work product (as general contractor) was "impaired" in the sense that it was defective: "Because the Pinkert's residence is 'impaired property,' Exclusion 'n' applies to the claim and excludes it from coverage under the policy." App. 28a. But the district court failed to consider that "impaired property" is a specially defined term within the policy. Under that special definition, "impaired property" means "tangible property, ***other than*** 'your product' or 'your work' . . . ." Under the policy's separate definition of "your

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3. Here the district court ignored the actual, undisputed facts in favor of a "four corners" approach. When we combine this analysis with the district court's separate treatment of Exclusion (j), we see a new doctrine emerge (the "insurer's election" doctrine?) to this effect: that the insurer may rely on facts extrinsic to the underlying complaint to defeat the duty to defend, while ignoring extrinsic facts that trigger the duty to defend.

4. Professor Windt appeared in the case as Harleysville's testimonial expert on insurance issues.

work", the entire project was the Brosnahans' work — and naturally enough, since they served as general contractor. Indeed, Harleysville's Rule 30(b)(6) designee admitted that the entire Pinkert residence was the work of the Brosnahans under the "your work" definition.

In other words, the district court found that the Brosnahans' work product (the residential home) was "impaired property", so that the exclusion would apply. But the policy's definition of the term makes clear that the Brosnahans' work product can ***never*** be impaired property (and Harleysville agrees).

* * *

On April 13, 2001, the Brosnahans moved to alter or amend the district court's judgment pursuant to Federal Rule of Civil Procedure 59(e). Thereafter, on July 12, 2001, Harleysville secured the Brosnahans' dismissal from the *Pinkert* case in return for a payment by Harleysville of $170,000 to the Pinkerts. Thus, in a case in which the trial court had only just ruled that there could be no ***possibility*** of indemnity coverage — for this is what it means to deny the duty to defend — Harleysville voluntarily made a six-figure indemnity payment.

Believing that Harleysville's indemnity payment constitutes a waiver of any right to contest the duty to defend, the Brosnahans sought leave to supplement their Rule 59(e) motion on the waiver issue.

Finally, on January 18, 2002, the district court entered its Rule 59(e) order. That order upheld the district court's prior analysis on the "occurrence" issue, and on Exclusions

(k)(5), (m) and (n). It granted the Brosnahans' motion for leave to file a supplemental submission on the waiver issue (which the Brosnahans had previously filed, on a conditional basis); but held that no waiver had been made. Significantly, it reversed the district court's earlier ruling on Exclusion (j) (the "professional services" exclusion), reliance on which Harleysville had since abandoned. App. 29a-30a.

The Brosnahans filed their Notice of Appeal on February 1, 2002.

B. Proceedings in the Third Circuit

The Third Circuit affirmed the district court's decision on January 21, 2003. Everything about the opinion confirms the basic thrust of this petition: that this appeal simply fell through the Third Circuit's administrative cracks, and that (in particular) the Third Circuit never read the Brosnahans' briefs, never considered their arguments, and never acquainted itself with the undisputed facts.

The opinion is just five pages long. The first three pages are devoted almost exclusively to the case caption, a summary of the procedural history, and a statement of the standard of review. The fifth page, meanwhile, sets forth only the Circuit Judge's conformed signature. Thus, the Third Circuit's entire legal analysis on the multiple issues presented by the Brosnahans' appeal was set forth in a single paragraph on page 4 (shown here at App. 4a). No mention was made of the term "human agency", though that concept was the linchpin of the district court's "accident" analysis. No mention was made of the district court's construction of "is" as "was", or the related "present tense vs. past tense" debate under Exclusion (k)(5). No mention was made of Exclusion (m) whatever, or its

exception for claims targeting the work of subcontractors. And no mention was made of the policy's special definition of "impaired property", or Harleysville's binding admission that the "impaired property" exclusion cannot apply.

But that is not all. A comparison of the Brosnahans' briefs to the Third Circuit's skeletal analysis confirms that the court ignored critical, uncontroverted evidence on a host of issues, along with unchallenged legal authorities that were directly on point — and all this while purporting to adhere to the standards for summary judgment.

1. ***The waiver issue***. The Third Circuit was asked to decide whether Harleysville's voluntary payment of indemnity under the policy (to the tune of $170,000) waived its right to contest the duty to defend. In resolving this issue — to which it devoted barely one page of analysis — the court stated conclusions of fact that are shockingly inconsistent with the undisputed record. It also ignored a reported decision of the Ninth Circuit, directly on point.

The Third Circuit rejected the waiver argument for two reasons. First, the court explained, "the Brosnahans and Harleysville executed a non-waiver agreement which permitted Harleysville to investigate the Pinkerts' claim and reserve all of Harleysville's rights under the commercial general liability policy." App. 4a. Second, "[w]hen the Brosnahans filed a third-party complaint against subcontractors in October 2000, Harleysville was presented for the first time . . . with the possibility that subcontractors negligently and accidentally caused damage to the building." *Id.* But Harleysville admits that the non-waiver agreement was procured through fraud and deceit; and it has repeatedly admitted that it learned of the subcontractors' role, and the underlying complaint's targeting of that role, in December 1999.

When the Brosnahans first notified Harleysville of the underlying claim, Harleysville forced them to sign a non-waiver agreement. They did this by threatening total inaction on the claim; that is, by telling the Brosnahans that if they failed to sign, no investigation would ever take place:

> Without a non-waiver being executed and returned, Harleysville will be unable to reach a determination as to the claim currently being presented.

(February 1, 1999 letter from Harleysville to the Brosnahans.) This was a fraud:

> Q: Okay. Now, that representation that Harleysville made to the Brosnahans in this February 1, 1999, (sic) letter, that was false, wasn't it, sir?
>
> * * *
>
> A: I would have to answer that that's correct.
>
> Q: Okay. And it was false because whether or not the Brosnahans signed any new contract at all or whether they said we're not signing anything, we've already paid you a premium, we've already got a contract with you, Harleysville had a duty to investigate fully and fairly, anyway?
>
> A: That's correct.

(Testimony of Harleysville's designee under Federal Rule of Civil Procedure 30(b)(6), R. Slomiany.) Harleysville's

designee likewise admits that the company never told the Brosnahans that if they signed the non-waiver contract, they would surrender legal rights.[5]

Harleysville thus forced its consumer insureds to sign a second (non-waiver) contract through intimidation and deceit. Had the Brosnahans refused to sign, they were told, Harleysville would refuse in turn to even consider the claim; while signing would lead (as we now see) to the compromise of important legal rights. This evidence — which essentially establishes fraud and extortion by Harleysville — could not properly be ignored on summary judgment. Yet the Third Circuit did just that.

The second ostensible basis for rejecting the waiver argument lay in the assertion that Harleysville learned of the subcontractors' role for the first time in October 2000. But this is simply false.

In December 1999 the Brosnahans wrote to Harleysville asking that their claim be reconsidered. The letter left no doubt about the role of subcontractors, or whether the subcontractor's exception had been triggered:

> The *Pinkert* complaint correctly alleges that Brosnahan Builders acted as general contractor for construction of the beachfront home. Brosnahan Builders was assisted, however, by subcontractors. Indeed, subcontractors were involved in applying the fiberglass jellcoat for waterproofing of portions of the Pinkerts'

5. The purpose of Rule 30(b)(6) "is to create testimony that would bind the corporation." *Sanders v. Circle K Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991).

> home; and they were likewise involved in the installation and finishing of drywall and finish. This "subcontractor" work is squarely targeted by the complaint. * * * Reading the complaint (as we must) in a light most favorable to Harleysville's insureds, it is clear that the "subcontractor's exception" to Exclusion "m" has been triggered. Accordingly, the exclusion does not apply.

Significantly, the December 1999 letter identified specific paragraphs in the underlying complaint that targeted the subcontractors' work.

Harleysville's 30(b)(6) designees have repeatedly confirmed that with its receipt of the December 1999 letter, Harleysville knew that the underlying complaint targeted the work of subcontractors:

> Q: In my December 22, 1999, (sic) letter I told Harleysville in plain English that subcontractors were involved in building the Pinkert home, didn't I?
>
> A: On page 6, yes, you did.
>
> Q: So from that point forward, Harleysville could never again claim ignorance as to whether subcontractors were involved in building the Pinkerts' home. Is that fair to say?
>
> A: I would think that's a correct statement, yes.
>
> * * *

Q: Didn't I tell Harleysville in plain English on December 22, 1999, that the subcontractors' work was targeted by paragraphs 32(i) and 32(k) of the complaint?

A: That's what you're saying in this letter, yes.

Q: And that's said rather clearly in the letter, isn't it, sir?

A: You are quite clear, yes.

Q: So when Harleysville received and read this letter in December of 1999, from that point forward, it could no longer claim ignorance that the work of the subcontractors was targeted by the Pinkert complaint at paragraphs 32(i) and 32(k). Is that fair to say?

A: I would think that's fair to say, yes.

(Further testimony of Harleysville's designee, R. Slomiany.) A second designee, Jamie Bruner, was the very employee through which Harleysville claimed to have learned of the subcontractors' role in October 2000. It was she who — unaware of the December 1999 letter, because her superiors in the home office never forwarded it to the file — wrote to the Brosnahans on October 16, 2000 to this effect: "We have recently learned that there were subcontractors involved and there is a possibility of resultant damages being claimed." But testifying on Harleysville's behalf, Ms. Bruner admitted that this statement — that Harleysville "recently learned" of the subcontractors' role as of October 2000 — was untrue:

Q: Now that you know that [the Brosnahans' December 1999 letter to Harleysville] does exist,

> would you agree with me that when you told the policyholders in October 2000 that Harleysville had recently learned that subcontractors were involved, that that was — that was not a true statement?
>
> A: Correct.

The Third Circuit ignored this critical evidence, finding that Harleysville was unaware of the subcontractors' involvement prior to October 2000: "When the Brosnahans filed a third-party complaint against subcontractors in October of 2000, Harleysville was presented for the first time, through the averments in the third-party complaint, with the possibility that subcontractors negligently and accidentally caused damage to the building." App. 4a.[6]

The Third Circuit's waiver analysis is also directly contrary to the Ninth Circuit's holding in *Travelers Indem. Co. of Ill. v. Ins. Co. of North Amer.*, No. 98-56276, 2000 WL 278390 (9th Cir. March 14, 2000) ("*Travelers v. INA*"). There the insurer contributed toward settling the underlying claims, then balked at paying a proportionate share of the underlying defense costs. The Ninth Circuit held that equity required the insurer to pay for the defense. And why? Because as a matter of equity, payment of indemnity waives any right to contest payment of defense costs:

> INA participated in a settlement in each of the three lawsuits, acknowledging that its policy covered the

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6. Ironically, the district court did ***not*** find that Harleysville learned of the subcontractors' role for the first time in October 2000; it ruled instead (though incorrectly) that Harleysville was free to ignore the true facts. The Third Circuit thus compounded its error by reaching a factual question of first impression. But the larger point (and a fairly objective one, we think) is that December 1999 precedes October 2000 by ten full months.

> claims of property damage. Therefore, "equity overrides the terms of the insurance policies. . . ."

Travelers v. INA, 2000 WL 278390, at *3 (citation omitted).

It could hardly be otherwise. The duty to defend is far broader than the duty to indemnify; and no insurer can contest the ***possibility*** of an indemnity obligation — all that is needed to trigger the duty to defend — when it pays full indemnity. Indeed, so absurd is the result here that we respectfully challenge any competent legal researcher to find any other case, in any jurisdiction, permitting an insurer to contest the duty to defend after paying full indemnity.

2. ***The "occurrence" issue***. The Third Circuit held that the underlying *Pinkert* complaint did not allege an "occurrence" (or "accident") because it essentially pled just breach of contract and defective workmanship. It reached this conclusion despite the fact that Harleysville, in its answering brief, agreed that the *Pinkert* complaint asserted claims of negligent misrepresentation against each of the three Brosnahan insureds.

But the Third Circuit's conclusion is more remarkable still when one considers that two of those insureds, Kevin and Linda Brosnahan, never entered into any contract with the Pinkerts; never supplied any "workmanship" to the Pinkerts; and were never sued by the Pinkerts for either breach of contract or defective workmanship. Rather, they were simply sued for alleged misrepresentations regarding the quality of Brosnahan Builders' work. Thus, in addition to ignoring the *Pinkert* complaint's express counts for negligence as against all three insureds, the Third Circuit created an underlying breach of contract claim against two of those insureds where no contract existed. None of this is remotely consistent with the summary judgment standard.

3. ***The meaning of "is" redux***. The Third Circuit's entire discussion of the disputed policy exclusions is set forth in a single sentence: "The district court also found that Exclusions k(5) and (n) apply to bar coverage . . . thus precluding any duty to defend. . . ." App. 3a (citation omitted). But in fact, neither exclusion applies, and this is (or should have been) clear from the exclusions themselves.

Exclusion (k)(5) applies only to claims of property damage to real property "on which you or any contractor or subcontractor working . . . on your behalf ***is performing operations***. . . ." The exclusion is thus written in the present tense, and purposefully so — after all, subdivision (6) of the same exclusion refers to work that "was . . . performed. . . ." Yet the district court interpreted Exclusion (k)(5) in the past tense: "The Pinkerts' home is considered 'real property,' and plaintiffs, themselves or through subcontractors, ***were performing*** 'operations' on that property." App. 26a (emphasis added). This is manifestly wrong.

First, courts interpreting the exclusion have held that it "is written in the present tense and must be construed to bar coverage for a contractor's work ***only at the time the work is being performed.***" *American Mercury Ins. Group v. Urban*, No. 00-2122-DJW, 2001 WL 1723734, at *8 (D. Kan. May 23, 2001) (emphasis added). Second, the *Pinkert* complaint clearly alleged property damage (in the form of continuing water leaks and other damage) occurring ***after*** the Brosnahans completed their work. It alleged, for example, that the plaintiffs took up residence in November 1998 — meaning that for purposes of the policy, the Brosnahans' work was completed as of that date.[7] And the district court concluded as much: in its analysis of Exclusion

7. The policy expressly provides that the contractor's work is deemed complete when put to its intended use.

(k)(6), it found that "the Pinkerts' home was complete when the property damage occurred. . . ." App. 26a. In sum, the *Pinkert* complaint must logically be read to allege property damage arising after the plaintiffs first moved in. And all such property damage — that is, any portion occurring after the Brosnahans completed or abandoned their work — would be beyond Exclusion (k)(5)'s reach.

It is fundamental that a policy exclusion written in the present tense must be read in the present tense — particularly where (as here) it is supplied by the insurer. The Third Circuit failed to do this, apparently in ignorance of both the exclusion's express terms and the Brosnahans' briefing on the subject. This is not how summary judgment should proceed.

4. ***The meaning of "other than."*** Exclusion (n) applies only to "impaired property" or "property that has not been physically injured. . . ." The district court upheld the exclusion on the first ground, but not the second: "Because the Pinkert's residence is 'impaired property,' Exclusion 'n' applies to the claim and excludes it from coverage under the Policy." App. 28a. But the policy defines "impaired property" to mean "tangible property, ***other than*** 'your product' or 'your work'. . . ." Because the Brosnahans served as general contractor, the entire project is their work:

> Q: Okay. The entire house is the work of Brosnahan Builders because they are the general contractor?
>
> A: Correct.

* * *

> Q: Well, under ordinary circumstances, can we agree that if a general contractor builds a house, then whether or not he uses subcontractors, all the work is done by him or on his behalf?
>
> A: I think that's a fair statement, yes.

(Testimony of Harleysville's designee, R. Slomiany.) *And cf. Blaylock and Brown Construction, Inc. v. AIU Ins. Co.*, 796 S.W.2d 146, 155 (Tenn. Ct. App. 1990) (noting that a general contractor "can employ subcontractors or use employees to do the work, but in the end, when the work is completed, all the work called for by the contract on the part of the contractor must be deemed to be work performed by the contractor.") Thus, the "impaired property" exclusion could never apply to the Brosnahans' work.

None of this should have escaped the Third Circuit, because it was all featured prominently in the Brosnahans' briefs. Certainly the Third Circuit should never have granted summary judgment on a policy exclusion without first familiarizing itself with the exclusion's terms. Yet it is plain that the Third Circuit did just that, because the terms of Exclusion (n), and its clear use of the words "other than", would necessarily have led the Court to an opposite result.

5. ***The rubber stamp***. The key to understanding the Third Circuit's approach lay in its fulsome praise for the district court's opinion: "In its Memorandum Opinion, the district court carefully and completely explained its reasons for finding that Harleysville had no duty to defend the Brosnahans in the underlying *Pinkert* action, and we can add little to the district court's thoughtful analysis." App. 3a. No fair-minded observer with any grasp of the issues could

harbor such sentiments. Again, the district court upheld one exclusion, Exclusion (j), that Harleysville itself admits is inapplicable. It stated clearly that just three exclusions (Exclusions (j), (k)(5) and (n)) barred the claim, then upheld a fourth exclusion (Exclusion (m)) seven pages later. App. 20a, 27a. Its discussion of Exclusion (m), meanwhile, appears under the heading "Exclusion 'm' Does Not Apply to the Claim" — even though it ultimately held that the exclusion did apply. App. 27a. Far from being careful or thoughtful, the district court's opinion was confusing and confused.

The Third Circuit's praise for the district court's analysis underscores what the totality of the record makes clear: that the Brosnahans have been denied any meaningful appellate review.

* * *

The Brosnahans timely sought rehearing of the Third Circuit's decision, calling the court's attention to the evidence and authorities it failed to consider. The Third Circuit denied rehearing without elaboration. This petition followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for three reasons.

First, the procedural integrity of summary judgment proceedings in the courts of appeals, and the substantive fairness of those proceedings, is uniquely a matter for this Court's review. That is why this Court has, over time, so carefully delineated the mechanics of summary judgment.

Nor can there be any question that the Third Circuit has departed from those standards. The standard for summary judgment mirrors the standard for judgment as a matter of law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); and both require a review of all the record evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). *Accord, Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (on summary judgment, evidence must be taken "as a whole.") The Third Circuit could not properly grant summary judgment to Harleysville, or deny summary judgment to the Brosnahans, without considering (for example) Harleysville's admission that its non-waiver agreement was procured by deception; or its admission that it first learned of the subcontractors' involvement in December 1999; or that Kevin and Linda Brosnahan never entered into any contract with the Pinkerts; or that all three Brosnahan insureds were expressly sued in negligence, etc.

Whether the Third Circuit's departures from the summary judgment standard are unique to this case (on the one hand) or systemic (on the other) we cannot say. We can say that in this case, the departures were many in number and profound in their effect. Under the circumstances, there is every reason to expect similar departures from the summary judgment standard in future Third Circuit cases. Review by this Court would forestall the problem.

Second, it should be clear that the Brosnahans have been denied any meaningful appellate review, and so denied both procedural and substantive due process. When a court does what the Third Circuit has done here — disregarding undisputed material facts wholesale in the context of summary judgment — it strays far from the usual and

accepted course of judicial proceedings. By exercising its supervisory power, this Court can restore integrity to the process. SUP. CT. R. 10(a).

Third, the Third Circuit's decision conflicts with the Ninth Circuit's holding in *Travelers v. INA* on a matter of the federal courts' equity jurisdiction. Again, *Travelers v. INA* held that where a liability insurer pays indemnity, equity works a waiver on its right to contest the duty to defend. *Travelers v. INA*, 2000 WL 278390, at *3. Under the Third Circuit's ruling, equity has no place in the analysis whatever. This conflict is real and direct; and relating as it does to the court of appeals' equity jurisdiction, is a matter of genuine importance.

CONCLUSION

The petitioners consist of a husband, his wife, and their small family-owned business. The disputed defense costs total roughly $200,000 — from the petitioners' perspective, a staggering sum. They have now spent half that again in this lawsuit, in a failed effort to persuade the federal judiciary that December 1999 came before October 2000, and that "is" does not mean "was."

To be sure, the petitioners are disaffected litigants, if ever that breed existed. But this petition is less about the result below than the remarkable manner in which it was reached.

The conclusion compels itself that the court of appeals simply ignored vast portions of the record on summary judgment. The petitioners thus seek review in this Court for the purpose of remanding the matter for meaningful appellate review.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 21, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1402

BROSNAHAN BUILDERS, INC.;
KEVIN BROSNAHAN; LINDA BROSNAHAN,

Appellants,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY

Appeal from the United States District Court
for the District of Delaware
(Civ. No. 00-cv-00339)
District Court: Hon. Sue L. Robinson

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 17, 2002

Before: NYGAARD, ALITO and McKEE, *Circuit Judges.*

(Filed January 21, 2003)

Appendix A

OPINION

McKEE, *Circuit Judge.*

Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan (collectively "Brosnahans") appeal the district court's grant of summary judgment to Harleysville Mutual Insurance Company. We will affirm.

I.

The Brosnahans, who are in the business of building single-family homes, filed this action in the district court on March 24, 2000, seeking a declaratory judgment that Harleysville, their commercial general liability insurer, must defend them in an underlying lawsuit, *Pinkert v. John H. Olivieri, P.A.*, Civ. No. 99-380 (the "*Pinkert* complaint"), which was filed in the district court on June 16, 1999. The *Pinkert* complaint alleged breach of contract and several counts of fraud arising out of a claim of defective workmanship by the Brosnahans under a contract to build a home for the Pinkerts in Bethany Beach, Delaware, and it requested recovery of damages for the cost of repairing and replacing the allegedly shoddy workmanship the Brosnahans performed.

In the *Brosnahan* declaratory judgment action, the parties eventually filed cross-motions for summary judgment. On March 30, 2001, the district court denied the Brosnahans' motion and granted Harleysville's motion. The court held that the *Pinkert* complaint did not contain allegations of "property damage" caused by an "occurrence" because it

alleged breach of contract and claims of defective workmanship. Accordingly, the court concluded that the allegations did not trigger any duty to defend under plaintiffs' commercial general liability policy. The district court also found that Exclusions k(5) and (n) applied to bar coverage to the Brosnahans, thus precluding any duty to defend the Brosnahans at the outset of the *Pinkert* litigation. *Brosnahan Builders, Inc. v. Harleysville Mutual Ins. Co.*, 137 F.Supp.2d 517, 527-28 (D. Del. 2001).

The Brosnahans later moved to amend the judgment, but the district court denied the motion. Prior to the court's denial of that motion Harleysville entered into a settlement agreement with the Pinkerts to dismiss all claims against the Brosnahans in exchange for a payment of $170,000 pursuant to its previously issued reservation of rights. The Brosnahans then argued that Harleysville had waived its right to contest its initial duty to defend them in the underlying action because of its participation in the settlement. The district court disagreed, holding that Harleysville's "indemnification of [the Brosnahans] . . . does not constitute a clear waiver of [Harleysville's] challenge to the duty to defend." Dist. Ct. Order of Jan. 18, 2002 (App. at 27). This appeal followed.

Our review of the district court's grant of summary judgment is plenary. *Huang v. BP Amoco Corp.*, 271 F.3d 560, 564 (3d Cir.2001). In its Memorandum Opinion, the district court carefully and completely explained its reasons for finding that Harleysville had no duty to defend the Brosnahans in the underlying *Pinkert* action, and we can add little to the district court's thoughtful analysis. Accordingly, we will affirm the district court's grant of summary judgment

to Harleysville substantially for the reasons set forth in the district court's Memorandum Opinion without further elaboration.

We will also affirm the district court's finding that Harleysville's participation in the settlement pursuant to its reservation of rights does not constitute a waiver of its right to contest its initial duty to defend the Brosnahans in the underlying *Pinkert* action. When first made aware of the *Pinkert* complaint, Harleysville disclaimed coverage based upon its belief that the allegations of the complaint did not trigger a duty to defend. Nonetheless, the Brosnahans and Harleysville executed a non-waiver agreement which permitted Harleysville to investigate the Pinkerts' claim and reserved all of Harleysville's rights under the commercial general liability policy. When the Brosnahans filed a third-party complaint against subcontractors in October of 2000, Harleysville was presented for the first time, through the averments in the third-party complaint, with the possibility that subcontractors negligently and accidentally caused damage to the building. At that point, Harleysville, although not bound to do so by the reservation of rights and non-waiver agreement, undertook the defense of the Brosnahans. Based on information Harleysville developed in the course of the representation, viz., that a previously unidentified subcontractor negligently attached drainpipes to the building roof scuppers in a manner which caused water damage to the interior of the building, Harleysville settled the *Pinkert* action on behalf of the Brosnahans pursuant to its reservation of rights and non-waiver agreement. However, Harleysville did not waive its right to contest any duty to defend from the time of the filing of the *Pinkert* complaint to the date of the assumption of the defense.

Appendix A

II.

For the above reasons, we will affirm the district court.

TO THE CLERK OF THE COURT:

Please file the foregoing Opinion.

/s/ Theodore A. McKee
Circuit Judge

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED MARCH 30, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 00-339-SLR

BROSNAHAN BUILDERS, INC.,
KEVIN BROSNAHAN and LINDA BROSNAHAN,

Plaintiffs,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Defendant.

Dated: March 30, 2001
Wilmington, Delaware

MEMORANDUM OPINION

SUE L. ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiffs Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan filed this action on March 24, 2000 seeking a declaratory judgment that their general liability insurer, defendant Harleysville Mutual Insurance Company, must defend them in an underlying lawsuit, *Pinkert v. John*

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H. Olivieri, P.A., No. 99-380-SLR, filed in this court on June 16, 1999.[1] Plaintiffs also allege breach of contract, bad faith breach of contract, and breach of the contractual duty of fair dealing. The court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1332. Currently before the court are plaintiffs' motion for summary judgment on the duty to defend (D.I. 12), and defendant's cross-motion for summary judgment on the duty to defend and indemnify (D.I. 16). For the reasons that follow, the court shall grant defendant's cross-motion for summary judgment on the duty to defend[2] and deny plaintiffs' motion for summary judgment.

II. BACKGROUND

Plaintiff Brosnahan Builders, Inc. ("Brosnahan Builders") is a Delaware corporation whose primary business is the construction of single-family housing. Plaintiffs Kevin and Linda Brosnahan, husband and wife, are the owners and sole operators of Brosnahan Builders. (D.I. 1 at ¶¶ 5-7) Defendant Harleysville Mutual Insurance Company is a mutual company

---

1. In October 2000, defendant agreed to defend plaintiffs in the *Pinkert* case, although reserving its rights to withdraw from all or part of the defense pending the court's decision on this motion. (D.I. 28) Plaintiffs still seek costs for defending the *Pinkert* action prior to October 2000, for which defendant has not agreed to reimburse plaintiffs.

2. The court's determination that defendant has no duty to defend plaintiffs renders defendant's arguments supporting limited indemnification and apportionment of costs moot. Plaintiffs' remaining claims in this action are based on the duty to defend and are also moot, as is plaintiffs' conditional motion for summary judgment on bad faith. (D.I. 40)

organized under the laws of Pennsylvania, primarily engaged in the business of insurance. (D.I. 4 at ¶¶ 8) Defendant is regularly engaged in the sale of insurance products in Delaware, and through those operations came to be plaintiffs' general liability insurer. (*Id.* at ¶ 9)

A. The Insurance Policy

Defendant issued to plaintiffs its policy no. CB-8A4826 (the "Policy") for an initial annual period from March 25, 1992 through March 25, 1993, and continuing thereafter on an annual renewal basis through at least March 25, 2000. (D.I. 14 at A1) The Policy provides both property insurance and Comprehensive Business Liability insurance, the latter provided with limits of $1 million for each occurrence, $2 million in the aggregate for injury or damage generally, and $2 million in the aggregate for injury or damage that comes within the Policy's "products — completed operations hazard" definition. (*Id.* at A66) The Policy designates as an insured the executive officers and directors of Brosnahan Builders "with respect to their duties as . . . officers or directors." (*Id.* at A99) It also designates as insureds any employees of the company "for acts within the scope of their employment." (*Id.*)

The Policy requires defendant to defend any "suit" that seeks damages because of "property damage" that occurs during the Policy's period and is caused by an "occurrence." (D.I. 18 at B41) A "suit" is defined as "a civil proceeding in which damages because of . . . property damage . . . to which this insurance applies are alleged." (*Id.* at B52) "Property damage" is "[p]hysical injury to tangible property, including

all resulting loss of use of that property; or [l]oss of use of tangible property that is not physically injured." (*Id.*) The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (*Id.*)

The Policy then lists several exclusions to illustrate situations when the business liability coverage does not apply. Those pertinent to this case include:

> a. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured.
>
> j. "Bodily injury" or "property damage" due to rendering or failure to render any professional service. This includes but is not limited to:
>
> (1) Engineering, drafting, architectural, legal, accounting or advertising services;
>
> (2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications.
>
> (3) Supervisory, inspection or engineering services;
>
> (4) Any cosmetic or tonsorial service or treatment;

Appendix B

(5) Optometry or optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;

(6) Ear piercing services; and

(7) Services in the practice of pharmacy; but this exclusion does not apply to an insured whose operations include those of a retail druggist or drugstore.

k. "Property damage" to:

(5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work"[3] was incorrectly performed on it.

---

3. "Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

(Cont'd)

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Paragraph (6) of [exclusion "k"] does not apply to "property damage" included in the "products-completed operations hazard."[4]

(Cont'd)

"Your work" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in "a" or "b" above.

(D.I. 18 at B53)

4. "Products — Completed Operations Hazard" includes all "bodily injury" and "property damage" arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned.

The "bodily injury" or "property damage" must occur away from premises you own or rent, unless your business includes the selling, handling or distribution of "your product" for consumption on premises you own or rent.

"Your work" will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

(2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.

(Cont'd)

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1. "Property damage" to "your product"[5] arising out of it or any part of it.

(Cont'd)

(3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or sub-contractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

(D.I. 18 at B52)

5. "Your Product" means:

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(1) You;

(2) Others trading under your name; or

(3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in "a" and "b" above.

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m. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard." This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

n. "Property damage" to "impaired property"[6] or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

---

6. "Impaired Property" is tangible property, other than "your product" or "your work" that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

If such property can be restored to use by:

(1) The repair, replacement, adjustment or removal of "your product" or "your work"; or

(2) Your fulfilling the terms of the contract or agreement.

(D.I. 18 at B-50)

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of a sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

o. Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product,"

(2) "Your work," or

(3) "Impaired property;"

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

(*Id.* at B44-B45)

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B. The *Pinkert* Litigation

In September 1997, Brosnahan Builders was hired by Michael and Eleanor Pinkert ("the Pinkerts") to construct a residential home in Bethany Beach, Delaware. Construction began in approximately September 1997 and continued through approximately April 1999. (*Id.* at A11-A12)

Defendant received notice of a claim in late January 1999, in which the Pinkerts alleged that the work performed by plaintiffs on their home was defective. (D.I. 14 at A7) Consequently, plaintiffs and defendant executed a "Non-Waiver Agreement" which permitted defendant to investigate the Pinkerts' claim and reserved all of defendant's rights under the Policy. (D.I. 18 at B58-B59) In a written disclaimer dated February 24, 1999, defendant stated that it would not defend plaintiffs because plaintiffs' "work" and "product" were not covered under the Policy. (*Id.* at A7)

On June 16, 1999, the Pinkerts filed a lawsuit against plaintiffs, among others, seeking damages and other relief in connection with the construction of their home. The allegations directed at Kevin and Linda Brosnahan arise from their duties as officers of Brosnahan Builders and from acts within the scope of their employment. (*Id.* at A10-A26) The *Pinkert* complaint seeks damages against plaintiffs for breach of contract, fraud, equitable fraud, and violations of the Consumer Fraud Act.[7] Specifically, the complaint alleges the following:

---

7. The counts alleging fraud (V, VI, VII) claim that: (1) plaintiffs "made false representations of material facts," (2) they "knew the

(Cont'd)

> 13. In response to [the Pinkerts' concerns about water and moisture penetration, the architect's] design required the use of above-standard construction measures and materials that would limit water and moisture penetration, including the installation of an expensive "Griffolyn" building wrap system that is more typically used in commercial projects. [The architect] also provided details for aluminum flashing around all doors and windows and roof vents to deflect or remove moisture that might get in the walls. In addition, extensive use of fiberglass was specified on the roof and decks with specific details given in the plans and specifications calling

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(Cont'd)

representations were false or recklessly disregarded the truth of the representations," (3) they "made the representations with the intent to induce [the Pinkerts] to pay for the work allegedly performed," and (4) "as a proximate and foreseeable result of [plaintiffs'] misrepresentations, [the Pinkerts] incurred damages." (D.I. 14 at A20-A23)

The counts alleging violation of Delaware's Consumer Fraud Act, 6 Del. C. § 2513, (IX, X, XI) claim that: (1) plaintiffs "made false or misleading representations of material facts in connection with the sale of construction services to [the Pinkerts]," (2) they "suppressed or omitted material facts, creating a condition of falseness, in connection with the sale of construction services to [the Pinkerts]," (3) they "made the representations, suppressions, or omissions with the intent to have [the Pinkerts] rely on them," and (4) "as a proximate and foreseeable result of plaintiffs' misrepresentations, suppressions, and omissions, [the Pinkerts] incurred damages." (*Id.* at A25-A29)

for the fiberglass to be run a minimum of eight inches up all walls to ensure that wind driven water would not get behind the fiberglass. These are all *critical* design elements of the house that were discussed in the early planning stages with [the architect], and later with Defendant Brosnahan, the construction contractor.

. . .

15. Construction of the residence began during September 1997 and continued through April 1999. During construction, both the architect and the contractor were aware of construction deficiencies relating to water and moisture proofing. These deficiencies included missing flashing, fiberglass installation at less than the specified height, and improper installation of the Griffolyn wrap system. Notwithstanding this knowledge, the architect and the contractor repeatedly assured the Plaintiffs, both orally and in writing, that these problems were, or would be, corrected.

. . .

22. After examining [certain leaks that developed after the Pinkerts moved into the residence], Defendant Kevin Brosnahan admitted the following:

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(a) The Griffolyn system installed was not the one specified;

(b) Mastic tape, which is an integral part of the Griffolyn water proofing system, was not used anywhere on the house; and

(c) There was no aluminum flashing around any of the windows that leaked.

(D.I. 14 at A12-A13)

On July 7, 1999, after reviewing the complaint, defendant again confirmed its decision not to defend plaintiffs, and reserved its right to rely on any other Policy exclusions whether or not they were previously mentioned. (*Id.* at A30-A44) On October 4, 1999, defendant's attorney wrote to plaintiffs' attorney, reiterating defendant's conclusion that the claim was not covered under the Policy. (D.I. 14 at A50)

On July 12, 2000, plaintiffs filed a third party complaint against various subcontractors alleging that some of the construction defects claimed by the Pinkerts were the responsibility of the subcontractors. (D.I. 28) On October 16, 2000, defendant undertook plaintiffs' defense in the *Pinkert* action, subject to the court's determination of the existence of a duty to defend and a reservation of rights to deny indemnification. (*Id.*)

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III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Horowitz v. Fed. Kemper Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled

to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

This case raises issues of contract construction which are questions of law to be addressed by the court. *See Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991). The parties agree that Delaware law must be applied to the case. *See Chesapeake Util. Corp. v. Am. Home Assur. Co.*, 704 F. Supp. 551, 556 (D. Del. 1989) (holding that under choice of law rules for contract disputes in Delaware, court must apply law of state of location of insured property in liability coverage dispute). Upon reviewing the Policy and the *Pinkert* complaint, the court concludes that defendant does not have a duty to defend plaintiffs in the *Pinkert* litigation either because the claim is not covered by the Policy or because the claim falls under Policy Exclusions "j", "k(5)" or "n".

A. The Claim is Not Covered By the Policy Because the Damage Was Not Caused By An "Occurrence"

The insured bears the burden of proving that a claim is covered by an insurance policy. *See New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1181 (3d Cir. 1991). Under Delaware law, an insurer has a duty to defend the insured if the allegations in the underlying complaint fall within the terms of the insurance policy. *See Continental Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974). The test is whether the underlying complaint, read as a whole, alleges a risk within

the coverage of the policy. *See id.* at 105. The Delaware Supreme Court has articulated the following principles to be applied when performing this analysis:

> (1) when there exists some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured;
>
> (2) any ambiguity in the pleadings should be resolved in favor of the insured;
>
> (3) if even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend arises.

See id. at 105.

Thus, in Delaware, an insurer's duty to defend its insured arises when the allegations of the underlying complaint show a **potential** that liability within coverage will be established. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11, 1992 WL 22690, at *7 (Del. Super. Ct. Jan. 16, 1992). *See also C.H. Heist Caribe Corp. v. Am. Home Assur. Co.*, 640 F.2d 479, 483 (3d Cir. 1981) (stating that duty to defend arises "if the allegations of the complaint state on their face a claim against the insured to which the policy potentially applies," and that "the factual allegations of [the third party's] complaint against [the insured] are controlling") (citation omitted) (emphasis in original); *New Castle County v. Hartford Accident and Indem. Co.*, 673 F. Supp. 1359, 1367 (D. Del. 1987)

(recognizing that under Delaware law "insurers are required to defend any action which potentially states a claim which is covered under the policy").

The Policy states that defendant must defend any "suit" against plaintiffs that seeks damages because of "property damage" that is caused by an "occurrence." The parties agree that the Pinkerts have filed a "suit" against plaintiffs because of "property damage." The parties disagree on whether that "property damage" was caused by an "occurrence." The Policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Therefore, the court must determine whether the damage to the Pinkerts' home was caused by an "accident."

In *State Farm Fire and Cas. Co. v. Hackendorn*, 605 A.2d 3, 8 (Del. Super. Ct. 1991), a case concerning coverage under a homeowners' policy where the claim involved bodily injury from a gunshot, the court stated that in defining an accident, an incident must be examined by "(1) taking the point of the injured person and/or (2) looking at the insured's conduct." The court also cited Black's Law Dictionary, which states that in the context of accident insurance contracts, "[a]n accident . . . is an event happening without human agency, or, if happening through such agency, an event, which under circumstances, is unusual and not expected by the person to whom it happens." *Id.* at 7. *See also Camac v. Hall*, 698 A.2d 394, 396 (Del. Super. Ct. 1996). Although the underlying claim and insurance policy in *Hackendorn* are different than those in the case at bar, the general principle is equally applicable here.

Appendix B

The Pinkerts allege breach of contract and several counts of fraud arising out of a claim of defective workmanship by plaintiffs. Specifically, the Pinkerts claim that plaintiffs were directed to install specific water proofing materials and failed to do so, and that the materials used were installed improperly. The Pinkerts also claim that plaintiffs misrepresented, either intentionally or with reckless disregard, the nature of their workmanship. The situation that led to the damage to the Pinkerts' home was clearly within the control of plaintiffs, as general contractor of the construction project, and not a fortuitous circumstance happening "without human agency." The "property damage" to the Pinkerts' home was not caused by an "occurrence" and, therefore, the claim is not covered under the Policy.

B. Even If Covered Under the Policy, the *Pinkert* Claim Falls Under Certain Policy Exclusions

Even if coverage were established, an insurer will be excused from its duty to defend if, as a matter of law, policy exclusions or exemptions apply. *See Rhone-Poulenc*, 1992 WL 22690, at *8. The burden is on the insurer to establish that policy exclusions apply in a particular case, and that they are subject to no other reasonable interpretation. *See Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569, 571 (Del. Super. Ct. 1997). Therefore, in order to avoid the duty to defend, the insurer must demonstrate that the allegations of the underlying complaint are "solely and entirely" within specific and unambiguous exclusions from coverage. *Rhone-Poulenc*, 1992 WL 22690, at *8. The parties

dispute seven Policy exclusions that are potentially relevant to the case at bar.[8] The court will address each exclusion *seriatim*.

1. Exclusion "a" Does Not Apply to the Claim

Exclusion "a" states that any claim for "property damage" that is "expected or intended from the standpoint of the insured" is excluded from coverage. Damage is not "intended" if the allegations of the underlying complaint allege civil recklessness. *See Capano Mgmt. Co. v. Transcon. Ins. Co.*, 78 F. Supp. 2d 320, 330 (D. Del. 1999). "Expected" can be defined as a "substantial probability," and requires more than a "reasonable foreseeability." *New Castle County v. Continental Cas. Co.*, 725 F. Supp. 800, 813 (D. Del. 1989). *See also Farmer in the Dell Ent. v. Farmers Mut. Ins.*, 514 A.2d 1097, 1100 (Del. 1986) ("Where the tortfeasor clearly lacks the intent to inflict any damage or injury, and it is not foreseeable that damage will occur, the exclusion will not apply."); *Rhone-Poulenc*, 1992 WL 22690, at *16 ("The specific allegations of negligence indicate a potential for coverage and therefore militate against a conclusion as a matter of law that [the insured] expected or intended to discharge a pollutant.").

In the case at bar, the Pinkerts allege that plaintiffs committed fraud because they either "knew the representations were false **or recklessly disregarded** the truth of the representations." In other words, the plaintiffs can be liable

8. The court finds no evidence of a clear waiver by defendant of any rights under the Policy. The court, therefore, will address the exclusions raised by the parties in their briefs.

for fraud and breach of contract without **intending** to cause the property damage. Although the Pinkerts allege that the damage to their home was "a proximate and foreseeable result" of plaintiffs' misrepresentations, the court is not persuaded that if plaintiffs acted recklessly, they would expect the damage to be a "substantial probability." Therefore, the court concludes that since the *Pinkert* complaint alleges liability without intent, Exclusion "a" does not apply. *See, e.g., Ash/Ramunno Assoc. v. Nationwide Mut. Fire Ins. Co.*, No. 95C-11-158, 1996 WL 658819, at *2 (Del. Super. Oct. 22, 1996) (holding that since there was question of fact as to whether insured's actions were intentional or negligent, insurer had duty to defend).

2. Exclusion "j" Applies to the Claim

Exclusion "j" states that a claim for "property damage" due to "rendering or failure to render any professional service" is excluded from coverage. Examples of such professional services include "supervisory, inspection or engineering services." Plaintiffs, as general contractor of the Pinkerts' construction project, were directly responsible for supervising and inspecting the work of the subcontractors to ensure that the home was built properly and in accordance with the terms of the contract. Therefore, since plaintiffs failed to install the correct waterproofing materials, or ensure that the subcontractors did so, plaintiffs did not adequately render a "professional service" and Exclusion "j" applies to the claim.

Appendix B

3. Exclusion "k(5)" Applies to the Claim[9]

This exclusion applies to property damage to "real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the property damage arises out of those operations." The Pinkerts' home is considered "real property," and plaintiffs, themselves or through subcontractors, were performing "operations" on that property. The "property damage" to the Pinkerts' home resulted from the defective "operations" of plaintiffs or their subcontractors. Therefore, Exclusion "k(5)" applies to the claim and excludes it from coverage under the Policy.[10]

---

9. Exclusions "k" through "o" are commonly referred to as "business risk exclusions," which "are designed to protect insurers from contractors' attempts to recover funds to correct deficiencies caused by the contractors' questionable performance. Their use demonstrates the insurers' belief that the cost of not performing well is a cost of doing business and not considered part of the risk sharing scheme for which general liability policies are written. . . . The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." *Vari Builders, Inc. v. U.S. Fid. and Guar. Co.*, 523 A.2d 549, 551 (Del. Super. Ct. 1986).

10. The parties also disagree on whether Exclusion "k(6)" applies to the claim. The court concludes that because Exclusion "k(6)" does not apply to completed work, and the Pinkerts' home was complete when the property damage occurred, Exclusion "k(6)" does not exclude the claim from coverage under the Policy.

4. Exclusion "l" Does Not Apply to the Claim

Exclusion "l" applies to property damage to "your product" arising out of it, but "your product" does not include "real property." Because the Pinkerts' home is considered "real property," the court concludes that Exclusion "l" does not apply.

5. Exclusion "m" Does Not Apply to the Claim

Exclusion "m" excludes from coverage a claim arising out of property damage to "your work" and included in the "products-completed operations hazard." However, the exclusion does not apply if the damaged work was "performed on your behalf by a subcontractor." The construction of the Pinkerts' home clearly qualifies as "your work," and was completed at the time of the damage, as required by the "products-completed operations hazard." The *Pinkert* complaint, however, does not state that the specific work was performed by subcontractors. Because the court must consider only the allegations in the complaint, Exclusion "m" excludes the claim from coverage under the Policy.[11]

---

11. Plaintiffs argue that because the *Pinkert* complaint is silent as to the role of subcontractors, the court may go beyond the four corners of the complaint to consider an affidavit by Kevin Brosnahan. Even if the court is allowed to consider this affidavit, however, the court finds it inconclusive. Kevin Brosnahan does not state that all of the work that led to the property damage suffered by the Pinkerts was performed solely by subcontractors. (D.I. 14 at A139-A141)

6. Exclusion "n" Applies to the Claim

Exclusion "n" excludes from coverage damage to "impaired property" or undamaged property that has an inherent defect or is not in accordance with the terms of a contract. The court concludes that the Pinkerts' residence is tangible property that is less useful because it incorporates deficient "work" by plaintiffs or is in violation of a contract, and can be restored to use by plaintiffs. Because the Pinkerts' residence is "impaired property," Exclusion "n" applies to the claim and excludes it from coverage under the Policy.

7. Exclusion "o" Does Not Apply to the Claim

Exclusion "o" is commonly known as the "sistership exclusion," and "operates to bar coverage for costs associated with the recall or removal of the product from the marketplace." *Hoechst Celanese Corp. v. Nat'l Union Fire Co. of Pittsburgh, PA.*, No. 89C-SE-35, 1994 WL 721631, at *2 (Del. Super. Apr. 13, 1994). The court concludes that this exclusion is not relevant to the case at bar, as the Pinkerts have not alleged damages for removal of the product from the market.

V. CONCLUSION

For the reasons stated, defendant's cross-motion for summary judgment on the duty to defend is granted, and plaintiffs' motion for summary judgment is denied. An appropriate order shall issue.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DENYING MOTION TO ALTER OR AMEND THE JUDGMENT, DATED JANUARY 18, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 00-339-SLR

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN and LINDA BROSNAHAN,

Plaintiffs,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Defendant.

ORDER

At Wilmington, this 18th day of January, 2002, having reviewed plaintiffs' motion to alter or amend the judgment (D.I. 60) and the papers submitted in connection therewith;

IT IS ORDERED that plaintiffs' motion is denied for the reasons that follow:

1. The actions allegedly taken by plaintiffs, as stated in the Pinkerts' complaint, did not lead to an injury of an accidental or fortuitous nature. Rather, the Pinkerts claimed

that plaintiffs failed to comply with their contractual obligations. Thus, the property damage suffered by the Pinkerts was not caused by an "occurrence," and plaintiffs' claim is not covered under the insurance policy.

2. Alternatively, plaintiffs' claim is excluded from coverage pursuant to Exclusions "k(5)," "m" and "n" of the insurance policy, for the reasons stated in the court's March 30, 2001 memorandum opinion.[1]

IT IS FURTHER ORDERED that plaintiffs' motion for leave to file a supplemental submission (D.I. 74) is granted, although the court finds that defendant's indemnification of plaintiffs, similar to defendant's assumption of plaintiffs' defense against the Pinkerts' lawsuit, does not constitute a clear waiver of defendant's challenge to the duty to defend.

IT IS FURTHER ORDERED that plaintiffs' motion to strike an unauthorized surreply brief (D.I. 69) is denied as moot.

s/ Sue L. Robinson
United States District Judge

---

1. Upon review of the deposition testimony of James Zoerkler, defendant's corporate designee, the court finds that Exclusion "j" does not apply in the present case because the mere installation of construction materials or general oversight of subcontractors does not constitute a "professional service." (D.I. 61, Ex. A at 129-35)

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED MARCH 6, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 02-1402

BROSNAHAN BUILDERS, INC.;
KEVIN BROSNAHAN;
LINDA BROSNAHAN,

Appellants

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY

SUR PETITION FOR REHEARING EN BANC

BEFORE: BECKER, SLOVITER, SCIRICA, NYGAARD ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES and SMITH *Circuit Judges*

The petition for rehearing filed by the Appellants in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for rehearing en banc and panel rehearing is hereby **DENIED.**

Appendix D

IT IS SO ORDERED.

By the Court,

s/ Theodore A. McKee
Hon. Theodore A. McKee
Circuit Judge

Dated: March 6, 2003

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1761

IN THE

Supreme Court of the United States

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN, and LINDA BROSNAHAN,

Petitioners,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Harleysville Mutual Insurance Company has no parent company and no publicly held company owns ten percent or more of its stock.

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COUNTER-STATEMENT OF THE CASE

Petitioners Brosnahan Builders, Inc., Kevin and Linda Brosnahan (collectively "Brosnahan Builders") initiated this insurance coverage declaratory judgment action on March 24, 2000 in the United States District Court for Delaware against Harleysville Mutual Insurance Company ("Harleysville") in which they alleged that Harleysville breached its duty to defend under a commercial general liability ("CGL") insurance policy issued to Brosnahan Builders for construction defect and consumer fraud claims asserted against them in the underlying action, *Pinkert v. Brosnahan Builders, et al.* ("the *Pinkert* Complaint"). In the coverage action, Brosnahan Builders pled claims of breach of the insurance contract, bad faith breach of contract and breach of the contractual duty of good faith and fair dealing against Harleysville.

The parties filed cross-motions for summary judgment on the issue of whether Harleysville breached the duty to defend the underlying action. On March 30, 2001, the district court denied Brosnahan Builders' motion for summary judgment and granted Harleysville's cross-motion for summary judgment. The district court found that the *Pinkert* Complaint did not set forth allegations of "property damage" caused by an "occurrence" as those terms are defined by the insurance policy sufficient to trigger a duty to defend on the part of Harleysville. In the alternative, the district court held that Exclusions k(5) and (n) of the CGL policy applied to bar liability insurance coverage for the lawsuit. As such, the court concluded that Harleysville correctly denied any duty to defend Brosnahan Builders at the outset of the *Pinkert* lawsuit.

Thereafter, Brosnahan Builders moved to amend the judgment pursuant to Fed. R. Civ. P. 59(a) on the basis that Harleysville's subsequent settlement of the *Pinkert* litigation waived the insurer's right to contest the duty to defend from the outset of the *Pinkert* lawsuit. The Rule 59(a) motion was denied on January 18, 2002.

Brosnahan Builders filed a timely appeal to the United States Court of Appeals for the Third Circuit. On January 21, 2003, the Third Circuit affirmed the lower court's holding. Brosnahan Builders' petition for *en banc* review before the Third Circuit was denied on March 5, 2003. This Petition for a Writ of Certiorari ensued.

REASONS FOR DENYING THE PETITION

I. Case Concerns State Law Issues Only – No Reason To Grant Certiorari

Brosnahan Builders' Petition for a Writ of Certiorari seeks review of the Third Circuit's application of Delaware state law to the resolution of an insurance coverage dispute. Petitioner does not identify any constitutional, federal question or other substantive basis meriting the granting of *certiorari*.

This case involves a dispute between an insurer, Harleysville Mutual, and its policyholder, Brosnahan Builders, over whether Harleysville was required to assume the defense of Brosnahan Builders and its owners for liability claims based on their alleged poor construction of a beachfront property. Under Delaware law, the determination of whether a liability insurer is obligated to defend the policyholder is measured by comparing the "four corners" of the Complaint to the insurance policy terms. *Continental Cas. Co. v. Alexis I. DuPont School District*, 317 A.2d 101, 103 (Del. 1974).

In June 1999, the Pinkerts commenced their lawsuit against Brosnahan Builders. Brosnahan Builders tendered the defense of the *Pinkert* lawsuit to Harleysville for a defense. Based on its reading of the *Pinkert* Complaint and the policy coverages, Harleysville concluded that Pinkerts sought recovery of damages based strictly on the policyholder's failure to construct the home in a workmanlike fashion and in conformity with the contract specifications – a liability risk which is not encompassed by the CGL insurance coverages[1]. Harleysville declined to assume the defense.

In July 2002, a third party complaint was filed by Brosnahan Builders against several subcontractors, the allegations of which precipitated Harleysville's decision to assume, on a prospective

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1. The district court correctly held, and the Third Circuit properly affirmed, that the breach of contract claim based on the insured's failure to perform their contractual obligations which necessitated repair work is not a chance, fortuitous or unusual event; rather, the claimed damages naturally flow from failing to follow building specifications. *See Pro Dent v. Zurich Ins. Co.*, 2002 U.S. App. LEXIS 5252 (3d Cir. 2002) (applying Pennsylvania law); *Redevelopment Authority of Cambria County v. International Insurance Co.*, 685 A.2d 581 (Pa. Super. 1996) (*en banc*), *alloc. denied*, 695 A.2d 787 (Pa. 1987); *Erie Insurance Property & Casualty Co. v. Pioneer Home Improvement*, 526 S.E.2d 28 (W. Va. 1999) (no duty to defend insured for faulty installation of siding under a commercial general liability policy as claims arose from breach of contract); *Bor-Son Building Corp. v. Employers Com'l Union*, 323 N.W.2d 58 (Minn. 1982) (finding no duty to defend insured for faulty construction of a high-rise apartment complex where damages arose from breach of contract); *Blaylock & Brown Construction v. AIU Insurance Co.*, 796 S.W.2d 146 (Tenn. App. 1990) (no duty to defend for damages arising out of insured's inadequate construction); *Peerless Insurance Co. v. Brennon*, 564 A.2d 383 (Me. 1989) (no coverage for claims of unworkmanlike construction because they arose from a breach of contract).

basis, the defense of the petitioner. The allegations of the third party complaint suggested the possibility that a subcontractor's negligence may have accidentally damaged other components of the building. While the insured general contractor is not insured for the cost of remedying the poor workmanship of its subcontractor, if a subcontractor negligently damages other contractor's work, then the "subcontractor exception" to the workmanship exclusion of the CGL policy may be triggered and thereby afford coverage for the value of such damage. Harleysville assumed the defense after October 2000 leaving in dispute defense costs incurred by the insured between December 1999 and October 2000.

The district court applied Delaware's "four corner" principle to find that the Pinkerts' allegations of shoddy workmanship directed against Brosnahan Builders did not trigger a duty to defend and that even if extrinsic evidence (to the complaint) proffered by Brosnahan Builders were considered, the insured's potential liability was for the uninsured costs of correcting poor workmanship – not one for accidentally caused injury to persons or property. This insurance coverage issue (which is common to the field of construction defect litigation) was fully briefed before the district court and the Third Circuit panel; *en banc* review by the Third Circuit was denied.

Dissatisfied with the adverse rulings, Petitioner, in blistering fashion, accuses the lower courts of having failed to consider its arguments and evidence – proclaiming the correctness of its insurance coverage position to be self-evident. While petitioner's outcry of disbelief at the court's rulings may reflect a dogged commitment to the case, the petitioner's plea for the granting of certiorari is that the lower courts misapplied Delaware law or that the text of the courts' opinions are demonstrative of cursory judicial review warranting this Court's exercise of its inherent

supervisory powers over the federal courts. Having chosen to institute this diversity action in federal court and not in the Delaware state courts, the petitioner seeks to invoke certiorari on a purely state law issue under the veil of an argument that the lower courts misapplied Fed. R. Civ. P. 56.

The lower courts correctly applied the governing standard for summary judgment under Fed. R. Civ. P. 56 and held that, as a matter of law, the *Pinkert* Complaint did not trigger a defense obligation. Simply contending that summary judgment was incorrect under Rule 56 because of Petitioner's misguided view as to the legal significance of extrinsic evidence proffered in support of its demand for a defense, does not satisfy the criteria for the granting of certiorari. *See* U.S. Sup. Ct. R. 10(a).

There is no conflict between the Third Circuit's decision in this matter and that of any other United States Court of Appeals. Petitioners have presented no evidence that the Third Circuit decision conflicts with a Delaware Supreme Court decision on a federal question; nor have they shown that the Third Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. U.S. Sup. Ct. R. 10(a). There is no constitutional or federal question presented; the issues raised in this matter are purely questions of state law interpretation which do not warrant review by this court. U.S. Sup. Ct. R. 10(c).

While Harleysville maintains that it had no duty to defend Brosnahan Builders in the underlying action[2], Petitioner proffers

2. Harleysville did not have a duty to defend Brosnahan Builders because the allegations in the *Pinkert* Complaint did not include claims for an "occurrence" resulting in "property damage" as these terms are defined by the CGL policy. Alternatively, Harleysville had no obligation to defend the Brosnahans by operation of Exclusions k(5), k(6), m and/or n.

its view of a legal error based on the application of the well-established state law principles of insurance contract interpretation – which is neither a new area of law nor an area wrought with conflict.

Throughout their Petition, Brosnahan Builders assert that the Third Circuit must not have read Petitioners' brief because "no fair-minded observer with any grasp of the issues could harbor such sentiments." Petition at 20. Certainly, this is not the first time a petitioner has sought review from this Court based on his/her belief that no "fair-minded observer" could have ever found against him/her – but that is hardly a sufficient reason to grant a petition for a writ of certiorari.

Petitioner focuses particularly on its belief that a December 1999 letter authored by its counsel to Harleysville indicated that for at least some of the work performed on the Pinkerts' home, subcontractors were used and that the court supposedly disregarded the significance of the letter.[3] The *Pinkert* Complaint was silent as to whether subcontractors were employed on the project. The lower courts applied Delaware state law which requires that a court look solely to the allegations of the complaint filed against the insured and compare the terms of the insurance policy in determining whether a duty to defend exists.

The lower courts correctly held that counsel's December 1999 letter did not create a duty to defend because it was extrinsic evidence to the complaint; under Delaware law, extrinsic evidence is not admissible in determining whether an insurer has a duty to defend. *See Alexis I. DuPont School District, supra.*

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3. The issue of whether a subcontractor was used by the insured is pertinent to the potential applicability of an exception to the "your work" exclusion which removes liability coverage for "property damage" or arising out of "your work".

Petitioner challenges the lower court's conclusion that Harleysville was free to ultimately settle the tort action and thereby indemnify its insured without waiving its right to contest a defense obligation prior to its assumption and control of the defense subsequent to October 2002. The court based this conclusion, in part, on the fact that Harleysville issued to the insured a reservation of rights letter and entered into a "non-waiver" agreement with the policyholder, thereby preserving its right to assert any defense to coverages. Petitioner contends that the lower court failed to consider their contention that the non-waiver agreement was procured by "fraud", a hyperbole which petitioner asserts was undisputed. The supposed "fraud" is that the letter accompanying the non-waiver agreement suggested that Harleysville required the policyholder's signature whereas the company would have continued to investigate the loss even if the insured chose not to sign the agreement.

Whether the insured was misled or confused as to the significance of signing a non-waiver agreement is immaterial to the insurance coverage inquiry — a contract based analysis — and did not merit much, if any consideration, by the lower courts let alone the United States Supreme Court. In addition, even if the non-waiver agreement were infirm (which Harleysville denies), Harleysville reserved its right to contest coverage in no less than four subsequent reservation of rights letters to the policyholder. There is simply no question or doubt, and the two lower courts properly decided, that Harleysville sufficiently reserved its right to challenge its duty to defend under the policy, regardless of whether the policyholder was induced to sign a non-waiver agreement.

Petitioners also seek a writ of certiorari based on their claim that the lower court's holding has some far-reaching implication that an insurance company will no longer have a duty to defend

a policyholder "where an accident was caused by a human." Petition at p. 5. This is a mischaracterization and gross exaggeration of the lower court's holding. Petitioners have focused on the district court's statement: "The situation that led to the damage to the Pinkerts' home was clearly within the control of the plaintiffs, as general contractor of the construction project, and not a fortuitous circumstance happening 'without human agency.'" Petition at 23a.

The "human agency" concept refers back to the court's earlier citation to the Black's Law Dictionary definition of an "accident", which states: "an accident is an event happening without human agency or, if happening through such agency, an event, which under circumstances, is *unusual* and not expected by the person to whom it happens." Petition at 22a. Petitioners extrapolate from this statement that any claim of negligence caused by an individual must not be an "occurrence" under the insurance policy to trigger liability coverage; however, it is quite clear from the district court's opinion that this extrapolation is unjustified.

Relying on the definition of "accident" provided by *Black's Law Dictionary*, the district court's solitary reference to "human agency" simply states that although an accident may be the product of human error, shoddy workmanship alone which must be corrected at the expense of one party to the contract is not, either in ordinary parlance or insurance coverage case law, an accidental event. Accidents require the confluence of chance events which result in an injury, which can be foreseeable (with hindsight) or entirely unexpected.

While the district court phrased its holding in terms of whether the damages were caused "without human agency" (referencing the first part of the *Black's* definition of "accident"), the court's holding that the damages were caused by events entirely within

the Brosnahan Builders' control (at least according to the complaint) expressed the same governing principle that the construction deficiencies with the Pinkert residence were not the result of a chance, unusual event.

The district court's holding does not create new law nor does it have any far-reaching implications. To the contrary, the holding that there is no "occurrence" or "accident" when a general contractor fails to perform its contractual obligations is well-established law. *See* footnote 1, *supra*.

Petitioners had ample opportunity at the summary judgment stage, through their motion to amend the judgment, their appeal to the Third Circuit and their request for Third Circuit *en banc* review, to present their factual and legal contentions. Due process implications are not at issue simply because a court does not attach the same significance to proffered evidence as does a party. This petition does not invoke any *bona fide* question of infringement of due process rights nor any challenge to the integrity of the judicial process in this case. Brosnahan Builder's petition is merely about a disillusioned party looking for yet another opportunity to argue their position regarding the existence of insurance coverage. While Petitioners may be in disbelief that their position as to coverage has not been accepted by any court reviewing their claim, this does not mean that there is a flaw in the judicial system or that their claims have been deprived of meaningful review.

While Petitioners attempt to overstate the implications of the district court's and Third Circuit's holdings, the underlying opinion reveals that the courts merely affirmed the well-established concept that a general liability insurance policy does not provide insurance coverage for claims of breach of contract based on shoddy workmanship.

Because the only possible question raised by the Petitioners involves the application of state law to the given set of facts, Harleysville respectfully requests that this Honorable Court deny Brosnahan Builders' Petition for a Writ of Certiorari.

II. The Third Circuit Decision Does Not Conflict With The Ninth Circuit Decision In Travelers Indemnity

Petitioners erroneously assert that this Honorable Court should review the Third Circuit's decision based on the assertion that it conflicts with an unpublished Ninth Circuit case. Petition at 16, 17. Even the most cursory review of these two decisions reveals there is no conflict between the holdings.

In *Travelers Indemnity Co. of Illinois v. Insurance Company of North America*, No. 98-56276, 2000 U.S. App. LEXIS 4114, 2000 WL 278390 (unpublished) (9th Cir. March 14, 2000)[4], the question before the Ninth Circuit was whether an excess insurer, INA, was required – under the express terms of its insurance policy – to contribute to the defense costs incurred by a primary insurer, Travelers, in three underlying actions here INA initially disclaimed coverage but later participated in the settlement of the cases. INA's insurance policy specifically provided that INA was obligated to defend after the retained limit of $100,000.00 (the self insured limit under the policy) was exhausted. Because the settlements exceeded $100,000.00, a duty to defend was triggered under the insurance policy.

Petitioners erroneously argue that this Ninth Circuit decision stands for the proposition that an insurer that participates in a settlement is required under the principles of equity to contribute to the insured's defense costs or that an insurer that funds a

4. In accordance with Ninth Circuit rules, the opinion may not be cited for precedential value. *See* Ninth Circuit Rule 36-3.

settlement waives its right to contest a defense obligation. This argument is incorrect. The Ninth Circuit's reference to the "equity" of requiring INA to contribute to the defense costs lies in the basis of the claim before that court: namely, Travelers sought *equitable* contribution from INA for the defense costs.

The *Travelers Indemnity* case did not involve a claim by the policyholder for a defense; rather, one insurer provided a defense and sought contribution from another. Moreover, the Ninth Circuit did not make any blanket statement to indicate that when an insurer participates in a settlement, equity dictates that it also contribute to the defense costs; rather, under the express terms of the insurance policy, the Ninth Circuit determined INA had a duty to contribute to the defense costs. The *Travelers Indemnity* did not address any issue of waiver.

The unpublished Ninth Circuit decision in *Travelers Indemnity* does not even address the issues decided by the Third Circuit let alone conflict with the decision. Further, *Travelers Indemnity* is a diversity jurisdiction case based on the application of California law; the *Brosnahan Builders* case rests on the application of Delaware law.

Accordingly, there is no conflict between the Third Circuit's decision in the present action and the Ninth Circuit's unpublished decision in *Travelers*. As such, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the reasons articulated above, Respondent, Harleysville Mutual Insurance Company, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 02-1761

IN THE

Supreme Court of the United States

BROSNAHAN BUILDERS, INC., KEVIN BROSNAHAN, and LINDA BROSNAHAN,

Petitioners,

v.

HARLEYSVILLE MUTUAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement for Petitioner, Brosnahan Builders, Inc., was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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Petitioners Brosnahan Builders, Inc., Kevin Brosnahan and Linda Brosnahan (collectively, the "Brosnahans") make this reply in support of their petition for a writ of certiorari.

In their petition, the Brosnahans showed that the Third Circuit's opinion is not explicable in terms of ordinary legal error; that instead, it reflects a profound ignorance of the record on summary judgment. Harleysville responds as it did below: with sweeping generalities supported only by *ipse dixit*, as though the record (including Harleysville's own sworn testimony) did not exist.

Yet Harleysville's opposition is not unhelpful. It makes new and important concessions, and offers new insight on why Harleysville is wrong; that is, why the essential issues are the lack of meaningful appellate review, and the integrity of the summary judgment process.

I. Federal Courts Cannot Invent the Record

Time and again Harleysville defines the Third Circuit's opinion in terms of what it calls "well established" law: that claims against a contractor for breach of contract and faulty workmanship are not insurable. At page 3 of its opposition, Harleysville confirms that both lower courts held "that the breach of contract claim based on the insured's (sic) failure to perform their contractual obligations . . . is not a chance, fortuitous or unusual event . . . ." Opposition at 3 n.1. Later in the opposition, Harleysville reiterates the theme: "[T]he holding that there is no 'occurrence' or 'accident' when a general contractor fails to perform its contractual obligations is well-established law." *Id.* at 9. And again:

> [T]he underlying opinion reveals that the courts merely affirmed the well-established concept that

> a general liability insurance policy does not provide insurance coverage for claims of breach of contract based on shoddy workmanship.

Id.

But our petition showed emphatically (and Harleysville does not dispute) that Kevin and Linda Brosnahan are not ***contractors***, but ***individuals***. They were sued in their individual capacity for negligent misrepresentation only; the *Pinkert* complaint neither alleged any contract with them, nor pled breach of contract against them. The "workmanship" of which the Pinkerts complained was supplied by Brosnahan Builders as contractor, not by Kevin or Linda Brosnahan. Nor was any "workmanship" claim remotely pled by the Pinkerts against either individual.

If the Third Circuit's reasoning is as Harleysville describes, how did we get here? How did Harleysville prevail against Linda Brosnahan with respect to workmanship she never supplied, and that her antagonists never claimed she supplied? How did it prevail against Kevin Brosnahan, on this principle of "no coverage for contract claims", when he was never subject to a contract claim or party to any contract?

Does Harleysville seriously contend that the lower courts enjoy some license to invent a fictional record in the name of summary judgment? Will this Court, too, pretend that Kevin and Linda Brosnahan were parties to a contract that never existed? Or that either of these individuals — both of whom are separate and independent "named insureds" under the Harleysville policy — supplied some fictional "workmanship" that the Pinkerts never even alleged?

In short, Harleysville cannot so much as summarize the Third Circuit's ruling without revealing that court's utter

disregard of material facts. And it was just this sort of fuzzy thinking that led the lower courts astray.

II. Federal Courts Cannot Reach Phantom Holdings

Harleysville's defense of the Third Circuit's analysis grows more tortured (and more revealing) on the issue of the "subcontractor's exception." Again, the "your work" exclusion (Exclusion (m)) bars coverage for claims of property damage to a contractor's work under specified conditions. But the exclusion contains an express exception: it does not apply "if the damaged work or the work out of which the damage arises was performed on [the insured's] behalf by a subcontractor." There has never been any dispute, meanwhile, that the *Pinkert* complaint targeted work done by subcontractors. Nor is there any dispute that Harleysville was made aware of the subcontractors' role through the Brosnahans' December 1999 letter. *See* petition at 13-15 (quoting from both the December 1999 letter, and Harleysville's testimony under Fed. R. Civ. P. 30(b)(6)).

Harleysville's task is to explain how the Third Circuit came to ignore this critical evidence; and how it came to find as a matter of law, against all the record evidence, that "[w]hen the Brosnahans filed a third-party complaint against subcontractors in October of 2000, Harleysville was presented ***for the first time***, through the averments in the third-party complaint, with the possibility that subcontractors negligently and accidentally caused damage to the building." App. 4(a) (emphasis added).

Harleysville meets this challenge (or purports to) by ascribing to the Third Circuit a phantom holding. The Third Circuit merely applied the "four corners" rule, says Harleysville, with two happy consequences: Harleysville could ignore the true facts of the subcontractors' involvement

in weighing its duty to defend; and the court could reject evidence of Harleysville's knowledge of the true facts on summary judgment.

But this is the stuff of fantasy. To begin with, the Third Circuit's opinion makes no reference to any "four corners" rule, or to any case law on the subject. It makes no mention of the December 1999 letter, or Harleysville's related 30(b)(6) testimony, or (indeed) the subcontractor's exception itself. And far from holding that Harleysville's first (December 1999) notice of the subcontractors' role could be discounted, it held expressly that other events (in October 2000) constituted notice of that role "for the first time." Harleysville thus argues that to understand the Third Circuit's ruling, we must contradict it, by reading the words "first time" as "second time" or "last time."

But that is not all. Harleysville's *apologia* for the Third Circuit assumes a "four corners" rule, whereby an insurer may ignore facts extrinsic to the underlying complaint that might otherwise trigger a duty to defend. Not only is that rule a fiction, but in the briefs below, the Brosnahans referred the Third Circuit to more than ***fifty*** reported decisions to the contrary — including a reported decision of the Delaware Supreme Court.

Harleysville cites *Continental Cas. Co. v. Alexis I. du Pont School Dist.*, 317 A.2d 101 (Del. 1974) as support for its backward reading of the "four corners" rule. But in that case, neither insurer nor insured looked to facts outside the underlying complaint. *Alexis I. du Pont School Dist.*, 317 A.2d at 103-05. It was not until the later case of *American Ins. Group v. Risk Enterprise Management Ltd.*, 761 A.2d

826 (Del. 2000) that the Delaware Supreme Court confronted an active attempt to resort to extrinsic facts:

> In construing an insurer's duty to indemnify and/or defend a claim asserted against its insured, a court typically looks to the allegations of the complaint. . . . The rationale underlying this principle is that the determination of whether a party has a duty to defend should be made at the outset of the case, both to provide the insured with a defense at the beginning of the litigation and to permit the insurer, as the defraying entity, to control the defense strategy. The present case, however, presents an unusual situation. [The insured] did not make a demand for defense until after the completion of discovery, almost three years after the underlying tort action was filed. Moreover, the determination of whether a duty to defend existed is being made after the underlying litigation has been settled. For these reasons, the urgency that often exists at the outset of litigation is not present.

Risk Enterprise Management, 761 A.2d at 829 (citation omitted). This analysis requires, if anything, that an insurer ***acknowledge*** extrinsic facts that it does not genuinely dispute. More than this, it suggests that Delaware law would not allow Harleysville to disregard the undisputed role of subcontractors where (as here) there was no remaining urgency to the "duty to defend" analysis. (Here, after all, the underlying lawsuit has long since settled.)

There is thus no magic in the "four corners" rule that permits an insurer to ignore undisputed facts laid at its doorstep. That is why Harleysville's insurance expert was able to collect forty-seven reported decisions for the

proposition that where "an insurer obtains information from which it appears that there might be coverage . . . the company has a duty to defend, even if the allegations of the complaint themselves would not give rise to such a duty." ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 4.03 (3d ed. 1995) (collecting cases). *See also Columbia Union Nat'l Bank v. Hartford Acc. & Indem. Co.*, 669 F.2d 1210, 1215 (8th Cir. 1982) ("Before declining to defend, an insurer has an obligation to look beyond the allegations made in the complaint . . ."); *Colonial Oil Indus. v. Underwriters*, 491 S.E.2d 337, 338-39 (Ga. 1997) (insurer has a duty to conduct a reasonable investigation and to base its coverage decision on the "true facts"); *Aetna Cas. & Sur. Co. v. Cochran*, 651 A.2d 859, 863-66 (Md. 1995) (realities of liability insurance require insurer to examine facts extrinsic to the underlying complaint); *Sentinel Ins. Co. v. First Ins. Co. of Hawaii, Ltd.*, 875 P.2d 894, 905-07 (Hawaii 1994) (insurer must consider any facts it can reasonably discover).

Harleysville's exegesis thus fails. The Third Circuit did not consciously reject the December 1999 letter under any imagined legal doctrine; rather, it failed to consider either the letter or the testimony on the letter's effect, being ignorant of both (though both were prominently featured in the Brosnahans' briefs below). That is why it found (as a matter of law, no less) that Harleysville learned of the subcontractors' role "for the first time" in October 2000.

Harleysville concedes that the entire appeal turned on the applicability of the subcontractor's exception to Exclusion (m) — and, by logical extension, on the role of the subcontractors themselves. Opposition at 4 (conceding that "if a subcontractor negligently damages other contractor's work, then the 'subcontractor exception' to the workmanship exclusion . . . may be triggered and thereby afford coverage. . . .") Given the importance of this issue, due process requires that it be decided on the actual record.

III. The Issue is Due Process

To be sure, the dispute on the merits is a matter of contract law. From this Harleysville argues that there can be no due process question — as though the mere presence of a state law dispute were enough to guarantee due process in every proceeding. But the evidence that the Third Circuit simply ignored this appeal is strong, and Harleysville cannot overcome it.

Harleysville is thus left to argue that due process does not matter — that the middling claims of a husband, his wife and their family-owned business are not worthy of due process. And so Harleysville insists that the Third Circuit can properly render summary judgment on the legal effect of a written agreement without considering undisputed evidence that the agreement was procured by falsehood. Opposition at 7 (arguing that "[w]hether the insured was misled . . . as to the significance of signing a non-waiver agreement is immaterial. . . .")

Whatever the outcome on the merits, Harleysville's conception of due process is repugnant. It should be rejected in the strongest terms.

Finally, we cannot pass over Harleysville's false quotation. It appears at the top of page 8 of Harleysville's opposition, with a citation to page 5 of the Brosnahan's petition. It clearly suggests to the reader that the quoted matter was taken from the petition itself — when in fact those words appear nowhere on page 5 of the petition, nor anywhere else in the petition's text.

The substantive mischief of this false quotation is negligible, but it speaks to Harleysville's approach to the issues: Say anything. Make any claim, with or without

support. If the facts are unfavorable, distort those that can be distorted and ignore the rest. The federal courts will never know the difference.

More than any other instrument of government, this Court is synonymous in the public mind with justice itself. Let this be the Court that finally confronts the true record, and brings fairness to the proceedings.

CONCLUSION

For the reasons stated in their petition, and for the reasons offered here, the petitioners seek review in this Court for the purpose of remanding this matter for meaningful appellate review.

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